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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALEXANDRA VILLA,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

B237104

(Los Angeles County  
Super. Ct. No. BC445883)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Michelle R. Rosenblatt, Judge. Affirmed.

Alessi & Bayard, Thomas J. Bayard for Plaintiff and Appellant.

Litchfield Cavo, Edward D. Vaisbort, Melinda W. Ebelhar and G. David Rubin  
for Defendant and Respondent.

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Plaintiff and appellant Alexandra Villa (Villa) appeals a judgment dismissing her action against defendant and respondent Wells Fargo Bank, National Association (the Bank) following the sustaining of the Bank's demurrer to Villa's first amended complaint without leave to amend.

The essential issue presented is whether Villa was entitled to mandatory relief under Code of Civil Procedure section 473, subdivision (b), for her counsel's failure to file an opposition to the Bank's demurrer to Villa's first amended complaint.<sup>1</sup>

Because mandatory relief does not lie in these circumstances, the trial court properly denied Villa's motion for relief under section 473. The judgment is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Pleadings.*

After commencing this action in September 2010, Villa filed the operative first amended complaint against the Bank on February 25, 2011. Villa pled in pertinent part: She owns a property on Mansfield Avenue in Los Angeles which served as her primary residence. She obtained a refinancing loan from the Bank in the sum of \$907,500. In the fall of 2008, she began having financial difficulties which made it difficult for her to make the mortgage payments. She contacted the Bank about a loan modification but was told she could not obtain a modification until she missed several payments. In January 2009, she missed her first payment. In March 2009, the Bank denied a loan modification and commenced foreclosure proceedings. After further negotiations, a temporary forbearance agreement and multiple payments by Villa, a Notice of Default and Election to Sell (NOD) was recorded on June 2, 2010.

The NOD identified the trustee as NDex West, LLC (NDex). However, at the time the NOD was recorded, the original trustee, Fidelity Title Insurance Co. (Fidelity) was the trustee of record. The substitution of trustee did not occur until June 29, 2010. Thus, at the time of issuance of the NOD, NDex was not the trustee. Because NDex was

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

not the trustee at the time the NOD was issued, the NOD was void. Thereafter, on February 3, 2011, the Bank conducted a trustee's sale on Villa's property.

At the time of the trustee's sale, Villa had an active bankruptcy case under Chapter 7, which she commenced *one day before the trustee's sale*. Before a creditor can proceed against any property of the bankruptcy estate, permission or a statement of disinterestedness from the trustee is required, regardless of whether the debtor's automatic stay is in effect. Therefore, the trustee's sale was invalid and in violation of federal law.

Based on the above, the first amended complaint asserted causes of action for declaratory relief, injunctive relief and wrongful foreclosure.

*2. The Bank's demurrer.*

The Bank demurred and concurrently filed a request for judicial notice of various materials, including the NOD, the Substitution of Trustee, and Villa's bankruptcy court records.

The Bank contended it had a clearly established right to foreclose because Villa admitted she defaulted on her loan and she had not tendered the amounts owed.

Further, as evidenced by the actual NOD, NDex issued the NOD as an "authorized agent" of the Bank, not as a substituted trustee of the Bank. Therefore, Villa could not prevail on her claim that NDex had not been duly substituted as trustee.

In addition, because Villa had not tendered the amounts owed in order to cure her default on the delinquent loan, Villa could not complain of any alleged irregularities in the foreclosure process.

As for the impact of Villa's bankruptcy filing, this was the *third* bankruptcy filed by Villa in the past 12 months.<sup>2</sup> Due to Villa's successive bankruptcy filings, the most recent case had no impact on the Bank's ability to foreclose.

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<sup>2</sup> The Bank cited title 11 United States Code section 362(c)(4)(A)(i), which states in pertinent part: "[I]f a single or joint case is filed by or against a debtor who is an individual under this title, *and if 2 or more single or joint cases of the debtor were*

3. *Hearing on demurrer; trial court's ruling.*

On May 4, 2011, the matter came on for hearing. Villa's counsel did not file written opposition to the demurrer. However, an attorney, Travis Guevara Kasper (Kasper), did appear on Villa's behalf at the hearing.

The trial court sustained the Bank's demurrer to the first amended complaint without leave to amend.

4. *Villa's motion seeking mandatory relief under section 473, subdivision (b).*

On July 21, 2011, Villa filed a motion seeking mandatory relief under section 473, subdivision (b).<sup>3</sup> The motion asserted the failure to file an opposition to the demurrer, and the failure to appear at the hearing on the demurrer, were the result of a calendaring error by counsel.

The affidavit of fault, filed by Attorney Thomas J. Bayard (Bayard), stated:

"4) I did not file an opposition to this demurrer and did not appear at this hearing [on May 4, 2011]. [¶] 5) The failure to file an opposition and the failure to appear at the hearing were a result of the fact that the demurrer was misplaced by me and was never calendared on either the electronic or paper calendars maintained by my staff and I. [¶] 6) As a direct and proximate result of this mistake, the demurrer was unopposed and judgment was entered in favor of Defendant."

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*pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case . . . ."* (Italics added.)

<sup>3</sup> The mandatory relief provision of section 473, subdivision (b), states: "Notwithstanding any other requirements of this section, *the court shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, *and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect*, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Italics added.)

Villa's moving papers consisted only of a memorandum of points and authorities and Bayard's affidavit of fault. In seeking relief under section 473 from her failure to oppose the Bank's demurrer, Villa did not proffer a proposed opposition to the Bank's demurrer, nor did she proffer a proposed second amended complaint.<sup>4</sup>

5. *The Bank's opposition to Villa's motion for relief.*

The Bank's opposition papers asserted that Bayard's factual basis for the application was demonstrably untrue. The Bank cited the May 4, 2011 minute order, which reflected that Attorney Kasper appeared at the May 4, 2011 hearing on behalf of Villa. Therefore, Villa's contention that no one appeared at the May 4, 2011 demurrer hearing due to a *calendaring error* was simply false and was a sufficient basis to deny the motion for relief.

6. *Trial court's ruling.*

On October 4, 2011, the trial court heard and denied Villa's motion, stating: "Plaintiff's motion is based upon certain inaccurate premises. First, although the demurrer was unopposed, an attorney did appear on behalf of Plaintiff. Second, the demurrer was sustained because it had merit. Leave to amend was not granted because the complaint and Defendant's request for judicial notice revealed that Plaintiff was proceeding upon legal theories that were not supported by the facts alleged. Although an attorney appeared for Plaintiff, it took three months for Plaintiff to file this motion, which was served with less than statutory notice. Further, no proposed opposition to the demurrer is attached to this motion. Finally, Plaintiff makes no suggestion on how [s]he could amend [her] complaint. For all of the foregoing reasons, the motion is denied. See CCP § 473(b) – noting that relief may not be granted when the adverse order is 'not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect . . . .'"

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<sup>4</sup> In this regard, section 473, subdivision (b) states "[a]pplication for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted . . . ."

On October 13, 2011, the trial court entered a judgment of dismissal in favor of the Bank. This timely appeal followed.

### **CONTENTIONS**

Villa contends she was entitled to relief under both the mandatory and discretionary provisions of section 473, subdivision (b).

### **DISCUSSION**

#### *1. The limited scope of the issues before this court.*

Villa's contention she was entitled to relief under the discretionary aspect of section 473, subdivision (b), is not properly before this court because Villa's motion did not request discretionary relief under section 473. Villa's motion rested solely on Bayard's affidavit of fault, and sought *mandatory* relief based on counsel's calendaring error. Because Villa did not request discretionary relief from the trial court, she cannot argue to this court that the trial court abused its discretion in not awarding such relief. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1126 ["trial court is not required to consider the availability of relief under the discretionary or mandatory provisions of section 473 in the absence of any request for relief under those grounds"].)

Further, Villa's opening brief does not contend the trial court erred in its rulings on demurrer. Although the sufficiency of a pleading is a question of law (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529), Villa, as the appellant, has the burden to show the trial court erred in its rulings. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.) With respect to the denial of leave to amend, Villa has the burden to demonstrate she is capable of amending her pleading to state a cause of action. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 748.) However, the opening brief is silent with respect to the sufficiency of Villa's first amended complaint. Further, the opening brief does not assert Villa's complaint is capable of being amended to state a cause of action. Therefore, those issues are not before this court.

Thus, our review is confined to Villa's contention she was entitled to mandatory relief under section 473, subdivision (b).

2. *Trial court properly denied Villa's motion for mandatory relief; mandatory relief does not lie in these circumstances.*

Villa contends she was entitled to mandatory relief, based on counsel's affidavit of fault, and therefore the trial court erred in denying her motion under section 473, subdivision (b). The argument fails.

The mandatory relief provision of section 473, subdivision (b), based on an attorney's affidavit of fault, requires the court, if certain prerequisites are met, to vacate a "default," a "default judgment," or a "dismissal." (*English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143 (*English*), italics added.) In this context, the word "dismissal" is construed as having a limited meaning similar to the term "default judgment." (*Id.* at p. 145.) In adding the word "dismissal" to the mandatory provision of section 473, subdivision (b), "the Legislature 'intended to reach *only those dismissals which occur through failure to oppose a dismissal motion – the only dismissals which are procedurally equivalent to a default.*' [Citation.]" (*English, supra*, at p. 145, italics added.)

Thus, various decisions have "construed the word 'dismissal' in the mandatory provision of section 473(b) as having a limited meaning to prevent that provision 'from being used indiscriminately by plaintiffs' attorneys as a "perfect escape hatch" [citation] to undo dismissals of civil cases.' [Citation.] Thus, we have held that the mandatory provision does not apply to: (1) a dismissal following the sustaining of a demurrer without leave to amend on the ground the statute of limitations had run [citation]; (2) a voluntary dismissal pursuant to a settlement agreement [citation]; and (3) a mandatory dismissal for failure to serve a complaint within three years [citation]." (*English, supra*, 94 Cal.App.4th at pp. 145-146.)

In the instant case, Villa relied on counsel's affidavit of fault to excuse her failure to oppose the Bank's demurrer to her first amended complaint. Because the nature of said proceeding was a demurrer, not a motion for involuntary dismissal, the mandatory relief provision of section 473, subdivision (b) has no application here.

3. *Even if mandatory relief could be had for failure to oppose a demurrer, on this record the trial court properly found the failure to oppose the demurrer was not due to counsel's calendaring error.*

Villa's motion for relief asserted "[b]ecause the demurrer was never calendared, the due date for the opposition was never scheduled *and no one was sent to appear at the hearings.*" (Italics added.)

However, relief based on counsel's affidavit of fault is not automatic. To reiterate, the mandatory relief provision states: "Notwithstanding any other requirements of this section, *the court shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, *and is accompanied by an attorney's sworn affidavit* attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . dismissal entered against his or her client, *unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.*" (§ 437, subd. (b), italics added.)

Here, in denying the motion for relief, the trial court recognized that "although the demurrer was unopposed, an attorney did appear on behalf of Plaintiff" at the May 4, 2011 hearing on the demurrer. The fact an attorney did appear on Villa's behalf at the demurrer hearing eviscerated Bayard's claim the demurrer was unopposed due to his calendaring error.

In sum, the trial court properly rejected the moving papers' contention the demurrer was unopposed due to a calendaring error by counsel.



**DISPOSITION**

The judgment of dismissal is affirmed. The Bank shall recover its costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.